

# Judges' Legal Culture in Dealing with High Number of Applications for Child Marriage Dispensation during Covid-19 Pandemic at the Kudus Religious Court

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## **Judges' Legal Culture in Dealing with High Number of Applications for Child Marriage Dispensation during Covid-19 Pandemic at the Kudus Religious Court**

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### **Abstract:**

This study aims to explore the judges' legal culture in the Kudus Religious Courts in dealing with the high number of applications for marriage dispensation during the Covid-19 pandemic. Making a decision on a case becomes problematic for judges because they have to make it on their personal considerations. This research was analyzed qualitatively using a constructivism paradigm with a socio-legal research approach based on primary data by interviewing 2 (two) judges, 3 (three) advocates, and 3 (three) applicants for a marriage dispensation. Moreover, it also employed secondary data, including the marriage law, marriage regulation and its implementation, relevant literature, and academic journals. The research findings are: First, the high number was caused by Kudus people's perception of the minimum legal age of marriage which is based on customary belief, which is maturity in social life, rather than legal regulation which is numerical age. Second, in making a decision about the case, the judges make considerations based on legal facts in the trial court and the values of justice living in the society while paying attention to the Supreme Court rules. Third, the legal culture of judges in

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<sup>1</sup> *Judges' Legal Culture in Dealing with High Number of Applications for Child Marriage Dispensation*

<sup>1</sup> deciding the application is making dialogue with some fellow judges while advising applicants to revoke their application.

**Keywords:**

Legal Culture; Judge; Marriage Dispensation; Kudus Religious Cour; Covid-19 Pandemic

**Abstrak:**

Penelitian ini bertujuan mengeksplorasi budaya hukum hakim di Pengadilan Agama Kudus dalam menghadapi tingginya permohonan dispensasi nikah di era pandemi Covid-19. Memutus kasus-kasus demikian menjadi problematis karena hakim harus memutuskan apakah permohonan harus dikabulkan atau tidak berdasarkan pertimbangan pribadi masing-masing. Penelitian ini menggunakan paradigma konstruktivisme dengan pendekatan socio legal research yang dianalisis secara kualitatif berdasarkan data primer berupa wawancara terhadap 2 (dua) hakim, 3 (tiga) advokat dan 3 (tiga) orang pemohon dispensasi nikah sementara data sekunder meliputi undang-undang perkawinan dengan peraturan pelaksanaannya, literatur terkait dan jurnal ilmiah. Temuan penelitian ini adalah: Pertama, tingginya angka pengajuan dispensasi nikah di Kudus disebabkan anggapan umum masyarakat Kudus bahwa batas usia untuk menikah adalah berdasarkan kepercayaan tradisional dan bukan menurut peraturan pemerintah. Kadar kedewasaan diukur dari kemampuan dalam kehidupan sosial dan bukan dari angka usia. Kedua, pertimbangan hakim dalam memutus pengajuan dispensasi nikah adalah berdasarkan fakta hukum serta nilai-nilai keadilan yang dipercaya masyarakat dengan berpedoman pada peraturan Mahkamah Agung. Ketiga, budaya hukum hakim dalam menyelesaikan permohonan dispensasi nikah adalah berdialog dengan sesama hakim lain sementara kepada pemohon, mereka biasanya menyarankan pembatalan permohonan.

**Kata Kunci:**

Budaya Hukum; Hakim; Dispensasi Nikah; Pengadilan Agama Kudus; Pandemi Covid-19

### Introduction

The hit of Covid-19 affects several aspects such as health, economic, psychological, and socio-cultural aspects. It has created a new culture in society, starting from the systems of social relations and values to the systems of carrying out economic activities. Therefore, the government has issued several policies to prevent people from being infected with the Covid-19. These policies are in the form of regulations that can manage public behavior. The community in the pandemic era is expected to obey all regulations related to preventing the Covid-19 spread. Theoretically, law must be able to regulate human behavior to follow the rules that have been set because it constructs community behavior.<sup>1</sup>

In the Covid-19 era, community's behavior is strictly regulated, such as implementing physical or social distancing, restricting outdoor activities, and carrying out activities from home or via virtual online platforms. Online activities have, among others, implications for teaching and learning activities in schools which oblige school-age children to take online learning.<sup>2</sup> Ineffective online learning becomes the cause of promiscuity for teenagers.<sup>3</sup> This promiscuity phenomenon can potentially affect children under the minimum legal age of marriage to get pregnant before marriage (married by accident).<sup>4</sup>

Consequently, the submission for marriage dispensation is getting higher due to the legal alteration of the minimum marriage age to 19 years based on Article 7 of the Marriage Law (UUP; *Undang-Undang Perkawinan*) Number 16 the year 2019. This regulation applies

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<sup>1</sup> Harry C. Bredemeier, "Law as Integrative Mechanism, Dalam Vilhelm Aubert, (Ed) *Sociology of Law*," (New York: The Free Press of Glenco, 1962), 37-38.

<sup>2</sup> Ni Nyoman Serma Adi, Dewa Nyoman Oka, and Ni Made Serma Wati, "Dampak Positif Dan Negatif Pembelajaran Jarak Jauh Di Masa Pandemi COVID-19," [Positive and Negative Impacts of Distance Learning During the COVID-19 Pandemic] *Jurnal Imiah Pendidikan Dan Pembelajaran*, 2021, <https://doi.org/10.23887/jipp.v5i1.32803>.

<sup>3</sup> Hendi Kusnandar Asep Deni Adnan Bumaeri, Hisam Ahyani, Ahmad Hapidin, "Fenomena Pernikahan Dibawah Umum Oleh Masyarakat 5.0," *Angewandte Chemie International Edition*, 6(11), 951-952., 2021, 2013-15.

<sup>4</sup> Hendi Kusnandar Asep Deni Adnan Bumaeri, Hisam Ahyani, Ahmad Hapidin, "Fenomena Pernikahan Dibawah Umum Oleh Masyarakat 5.0," *Angewandte Chemie International Edition*, 6(11), 951-952., 2021, 2013-15.

to every citizen in order to provide legal certainty relating to aspects of family law, assets, and marriage consequences.<sup>5</sup> The current regulation is actually appropriate because 19 years old persons are psychologically considered capable of getting married both physically and spiritually. It means that they can independently overcome the problems in their marriage. The regulation is expected to minimize the divorce rate and reduce negative social impacts that might happen because the former Law Number 1 the year 1974 which only set 16 years as the minimum legal age for women and 19 years for men<sup>6</sup> which is prone to lead to child marriage.

It, therefore, invalidates the previous regulation (Law 1 of 1974) which allowed children who are 16 (or under 19 years old for men) to get married without having to apply for a marriage dispensation. With the current enactment of Law Number 16 the year 2019, they are required to apply for a marriage dispensation in a Religious Court. As a result, the number of applications for marriage dispensation in Religious Courts has significantly increased.

This increment can be seen from the statistical data in Tulung Agung Religious Court. From 2019 until February 2020, 308 applicants applied for marriage dispensation, and it rapidly increased to 547 applicants from March 2020 until 2021 after the government officially announced the existence of Covid-19.<sup>7</sup> Meanwhile, in Bondowoso Religious Court, there were 299 applicants for marriage dispensation in 2019, 1.077 applicants in 2020, and 802 applicants in September 2021.<sup>8</sup> It means that there was an increase of 400% in marriage dispensation applications during the pandemic. Data from the Religious Courts of the Supreme Court recorded applications for marriage dispensation as many as 23.100 applicants in 2019 and 64.200 applicants in 2020.<sup>9</sup>

<sup>5</sup> K. Wajik Saleh, "Hukum Perkawinan Indonesia."

<sup>6</sup> Heryanti, "Implementasi Perubahan Kebijakan Batas Usia Perkawinan."

<sup>7</sup> Mayangkara, "Permohonan Dispensasi Pernikahan Di Pengadilan Agama Tulungagung Meningkatkan 200%," *MayangkaraNews.com*, 2020. (Diakses Pada 28 April 2022)

<sup>8</sup> Helmi Supriyatno, "Pandemi Covid-19, Permohonan Dispensasi Nikah Meningkatkan Di Kabupaten Bondowoso," *harianbhirawa.co.id*, 2021. (Diakses Pada 28 April 2022)

<sup>9</sup> Dwi Hadya Jayani, "Dispensasi Perkawinan Anak Meningkatkan 3 Kali Lipat Pada 2020," *databoks.katadata.co.id*, 2021. (Diakses Pada 28 April 2022).

Specifically, this study focuses on the cases in the Kudus Religious Court because it statistically shows a significant increase in the number of applications for marriage age dispensation. In 2017 and 2018, before the Covid-19 pandemic, applications for marriage dispensation were still low. However, the significant increment began at around 30% starting in 2019. From 2020 to 2021, it indicated that applications for marriage dispensation have increased by 300%. This seems to be one of the impacts of the official announcement of Covid-19's coming to Indonesia on Monday, March 2, 2020, by the Indonesian government.<sup>10</sup> This significant increase inevitably contributed to the burden on the court in resolving such cases.

The launching of the current regulation, which was followed by the pandemic, made the situation worse. This data is supported by several research results which show a high number of applications for marriage dispensation during the pandemic. For instance, Rini Heriyanti pointed out the increasing application for marriage dispensation over the regulation of the minimum legal age of marriage<sup>11</sup> and the increasing number of child marriages.<sup>12</sup> Accordingly, research conducted by UIN Mataram, which was published on the website of the Religious Courts (*Badilag; Badan Jenderal Badan Peradilan Agama*) of the Supreme Court website also indicated significant increases in marriage dispensation applications in this pandemic era.<sup>13</sup>

Apart from the pandemic factor, regulation of the minimum legal age of marriage has led people to apply for marriage dispensation in the pandemic era. Theoretically, the purpose of changing the minimum age limit for marriage from 16 years to 19 years for women is to prevent child marriage. Indeed, this change has triggered higher application requests for marriage dispensation. This

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<sup>10</sup> Gloria Styvani Putri, "Kilas Balik Setahun Covid-19 Di Indonesia, Pengumuman Hingga Vaksinasi," *Kompas*, 2021. Diakses tanggal 20 januari 2022

<sup>11</sup> Rini Heryanti, "Implementasi Perubahan Kebijakan Batas Usia Perkawinan," [Implementation of Changes in Marriage Age Limit Policy] *Jurnal Ius Constituendum*, 2021, <https://doi.org/10.26623/jic.v6i1.3190>.

<sup>12</sup> Khoirudin, "Perkawinan Di Bawah Umur Di Masa Pandemic," *Signifikansi Humaniora* Vol. 2, no. 3 (2021): 3-5.

<sup>13</sup> Tim IT PA Praya, "Peningkatan Permohonan Dispensasi Nikah Di PA Praya Pasca Perubahan Undang-Undang Perkawinan," <https://badilag.mahkamahagung.go.id/>, 2021.

increment is caused by the currently existing legal regulations that seemed not to consider community life situations, as explained by Brian Z. Tamanaha, who is famous for his "Mirror Thesis" theory. He stated that law is the reflection of a certain community from the ideas, traditions, values, and goals that exist in that society.<sup>14</sup>

Accordingly, an ideal law is said to be able to predict society's development as Von Savigny argued that law emerges from within society. Therefore, the law will always exist as long as the people still exist. It will also develop or disappear along with either existence or extinction of living society. The law becomes powerless if its regulatory nature is contrary to the will and the soul (*volkgeist*) of society<sup>15</sup> like what seemingly happens in the context of the current regulation of the minimum legal age for marriage. In fact, the law is supposed to be responsive to the will of the community<sup>16</sup> to lead them to obey it well, especially in the case of minimum legal age for marriage.

As mentioned earlier, the purpose of age restriction in marriage is to prevent child marriage and minimize any probable risks after marriage. The risks might impact domestic life, health, and psychology because children typically have not possessed emotional maturity yet. The lack of emotional maturity is worried to be prone to divorce in addition to the reproductive organs of women who are not ready to get pregnant.<sup>17</sup> However, this regulation becomes powerless when there are many requests for marriage dispensation which are

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<sup>14</sup> Brian Z. Tamanaha, *A General Jurisprudence of Law and Society, A General Jurisprudence of Law and Society*, 2010, <https://doi.org/10.1093/acprof:oso/9780199244676.001.0001>.

<sup>15</sup> Satjipto Rahardjo, *Hukum Dan Perilaku* (penebit buku Kompas, PT Kompas Media Nusantara, 2009).

<sup>16</sup> Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law, Law and Society in Transition: Toward Responsive Law*, 2017, <https://doi.org/10.4324/9780203787540>.

<sup>17</sup> Andi Marlah Susyanti and Halim Halim, "Strategi Pencegahan Pernikahan Usia Dini Melalui Penerapan Pusat Informasi Dan Konseling Remaja (Pik-R) Di Smk Negeri 1 Bulukumba," *Jurnal Administrasi Negara* 26, no. 2 (2020): 114-37, <https://doi.org/10.33509/jan.v26i2.1249>.

influenced by customary law, marriage at the parent's decision, and lack of religious literacy.<sup>18</sup>

On the one hand, interestingly, the current regulation aims to prevent child marriage so that people can be more prosperous. On the other hand, customary law traditions make people want their children to get married at an early age even though they have not reached the minimum legal age of marriage based on the Law. Therefore, this study will reveal the cause beyond the high number of application and the judge's legal culture towards the unpredictable high number of applications regarding the current regulation about the minimum legal age for marriage during the Covid-19 pandemic in the Kudus Religious Court.

### Method

This study uses a constructivist paradigm that perceives law as a social reality that subjectively produces judges' mentality. Their decision is considered a symbol<sup>19</sup> which is full of meaning and belief in values. We observed judges' behavior, attitudes, and culture through triangulation techniques using interviews and reading relevant documents in the form of court decisions so that they could comprehend the social context. Ontologically, this study is relativism<sup>20</sup> which involves community behavior. In this case, we examine the reality of living society which is constructed locally and specifically become the cause beyond the high number of application. Epistemologically, it reveals empirical truth from the subjectivity of the research findings. Methodologically, it uses hermeneutics or dialectics method of interpreting judges' behavior as a culture.

This research belongs to the non-doctrinal legal research tradition using a socio-legal approach.<sup>21</sup> The object of the study is the

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<sup>18</sup> Syarifah Rahmatillah and Nurlina, "Pencegahan Perkawinan Di Bawah Umur (Analisis Terhadap Lembaga Pelaksana Instrumen Hukum Di Kec. Blangkejeren Kab. Gayo Lues)," *Samarah*, 2018, <https://doi.org/10.22373/sjkh.v2i2.4748>.

<sup>19</sup> Soetandyo Wignjosebroto, *Hukum Paradigma, Metode, Dan Dinamika Masalahnya* (Elsam, 2002).

<sup>20</sup> Julie White, "Book Review: The SAGE Handbook of Qualitative Research," *Evaluation Journal of Australasia*, 2011, <https://doi.org/10.1177/1035719x1101100208>.

<sup>21</sup> Soetandyo Wignyosubroto, "Hukum Paradigma, Metode Dan Dinamika Masalahnya" (Jakarta: Huma, 2012), 148.



Law interpreted as an associated symbol from human mental construction putting the judge as a decision-maker on social facts related to the marriage dispensation application. Legal reality as a social fact will be reconstructed through qualitative methods.<sup>22</sup>

The data sources employed in this study are primary and secondary. The former was taken directly in the field, including 2 (two) religious court judges, 3 (three) advocates, and 3 (three) parents and children who applied for a marriage dispensation. The latter includes legal regulations, the Marriage Law (UUP) and its implemented regulations, documents, research results, and academic journals related to this study.

### **Discussion and Result**

#### **The Common Cause beyond the High number of the Application for Marriage Dispensation at Kudus**

Kudus is a *pesantren*-based (Islamic values tradition) community which, uniquely, is also influenced by firm customs as clear in their people's way of life. The legal culture of Kudus community has emerged as a result of cultural acculturation between Islam and the customs of the local community. For example, in the area of Undaan, Kudus, there is still a local custom known as "*kawin hanging*," which allows the marriage of immature children because according to the customary law, this tradition aims to avoid adultery.

This customary order will likely continue to evolve time by time because its unwritten source is continuously developed and maintained by the community with legal awareness. Also, although it adheres much to the traditional regulations inherited from their ancestors, it will possibly change according to the changing events of life in society. This is mainly because of its existence in the unwritten form.<sup>23</sup>

Therefore, the customary law order, such as the customary marriage system, will continue to develop. Traditionally, customary marriages are not only related to the bride and groom but also to the

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<sup>22</sup> Esmi Warrasih, "Penelitian Sosio Legal Research, Pemutahiran Data Metodologi" (Semarang: UNDIP, 2016), 7.

<sup>23</sup> Ellyne Dwi Poespasari, "Pemahaman Seputar Hukum Waris Adat Di Indonesia" (Jakarta: Prenadamedia Group, 2018), 220.

kinship system of both, namely the bride and groom's family.<sup>24</sup> Moreover, in traditional communities, marriage is an important event not only for living persons but also for those who have passed away. As they have a big concern with the spirits of their ancestors,<sup>25</sup> they usually provide offerings (*sesajen*) to them in the midst of the wedding ceremony. The values of this tradition are broadly believed and continue to be followed from generation to generation.<sup>26</sup>

Similarly, the customary law has also influenced the belief in child marriages or the minimum legal age for marriage. In Kudus, child marriage is not a new case because it has been done since the days of yore indeed. It commonly occurs for various reasons, ranging from economic problems, lack of education, interpretation of certain religious values or text, cultural understanding,<sup>27</sup> to effort to avoid any adultery.

Generally, customary law does not recognize any general boundaries for conducting a marriage, unlike civil law which normatively states the minimum legal age for a person to come into marriage life. Customary law is more familiar with incidentally recognizing someone from the physical appearance to find out whether or not he/she is capable of getting married. The benchmark used by the local community is based on their daily actions that show maturity. Moreover, it is natural for men and women to like each other which eventually lead to marriage.<sup>28</sup>

In other words, customary law does not make any numerical age of the prospective brides as measurement because it considers the brides' maturity instead. A mature definition in customary law is "*kuat gawe*" (able to work). It means that a man or woman is already considered mature if he/she is able to do adults work, is able to take

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<sup>24</sup> Hilman Hadikusuma, "Hukum Perkawinan Adat" (Bandung: Mandar Maju, 1983), 22.

<sup>25</sup> Abd. Rahman Ghazaly, "Fiqh Munakahat" (Jakarta: Prenada Media Group, 2006), 7.

<sup>26</sup> Supriyadi Supriyadi, "Perkawinan Sirri Dalam Perspektif Hukum di Indonesia," *YUDISIA: Jurnal Pemikiran Hukum Dan Hukum Islam*, 2018, <https://doi.org/10.21043/yudisia.v8i1.3229>.

<sup>27</sup> K. Wajik Saleh, "Hukum Perkawinan Indonesia" (Jakarta: Ghalia Indonesia, 1982), 4.

<sup>28</sup> Mulyadi, "Hukum Perkawinan Indonesia" (Semarang: Universitas Diponegoro, 2011), 6.

care of his/her own property, and physically, economically, and socially independent.<sup>29</sup> The term "*kuat gawe*" is used as the basis for local people to decide whether a person is eligible for marriage.<sup>30</sup> Consequently, child marriage still occurs even though it violates Article 7 of Law Number 1 the year 1974 and Law Number 16 of 2019 concerning the marriage law.

In a broader scope, child marriage still becomes a national problem, particularly for the Ministry of Women's Empowerment and Child Protection (PPPA; *Pemberdayaan Perempuan dan Perlindungan Anak*) because Indonesia is in 7<sup>th</sup> place on the world ranking even after the ratification of the current regulation.<sup>31</sup> Actually, child marriage is not only a problem in Indonesia but also a serious problem in some poor countries. It directly affects girls or young women who are made as bait by their parents to get economic interest. Those parents typically want to be free from any burden of raising children, so they choose to marry off their daughters as soon as possible. Another reason is for social stratification or social status interests to ensure their children get a good social position and strengthen their offspring lineage.<sup>32</sup>

In the context of the current regulation, interestingly, although marriage before 19 years old is a sort of rule violation, those who do it are allowed to apply for a marriage dispensation to the religious court. Accordingly, the Marriage Law (UUP) does not stipulate any sanctions against someone who gets married before turning 19. It is deemed, therefore, that one of the reasons for not regulating the legal sanction is because the marriage is theologically permissible.<sup>33</sup>

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<sup>29</sup> Ade Maman Suherman dan J. Satrio, "Penjelasan Hukum Tentang Batasan Umur" (Jakarta: Nasional Legal Reform Program, 2010), 2.

<sup>30</sup> Supriyadi Supriyadi, "Rekonstruksi Hukum Kewarisan Anak Dari Perkawinan Sirri Di Pengadilan Agama," *IJTIHAD Jurnal Wacana Hukum Islam Dan Kemanusiaan*, 2016, <https://doi.org/10.18326/ijtihad.v16i1.27-42>.

<sup>31</sup> Lenny Nurhayati Rosalina, "Mengawal Kedaulatan Bangsa" (Jakarta: Kementerian Pemberdayaan Perempuan dan Anak, 2020), 46.

<sup>32</sup> Saraswati Rika, "Hukum Perlindungan Anak Di Indonesia" (Bandung: PT Citra Aditya Bakti, 2015), 50.

<sup>33</sup> Dilema Perkawinan et al., "Dilema Perkawinan Usia Dini: Antara Tradisi Dan Regulasi," *Jurnal Dakwah Dan Sosial* 2, no. 2 (2019): 137-49, <https://doi.org/https://doi.org/10.5281/zenodo.3544214>.

Moreover, socio-cultural and moral reasons do exist beyond the decision for child marriage, namely, to prevent immoral acts of immature children and avoid negative promiscuity impacts. Among others, this is mentioned by one of the informants as follows:<sup>34</sup> "Even though my child is less than 19 years old, I still manage her to get married to avoid promiscuity. Besides that, it does not violate any religious values and local people are also used to getting married at the age of fewer than 19 years." It is also believed that if the prospective brides get a blessing from their parents to get married, they will get happiness in their household.<sup>35</sup>

Besides, the lack of literacy towards the minimum legal age for marriage according to the current law has caused Kudus society to apply for a marriage dispensation. They have just found out about the regulation when registering their marriage in the Religious Affairs Office (KUA; *Kantor Urusan Agama*) and the KUA officer advised them to apply for a marriage dispensation. On the one hand, this lack of literacy for local people becomes one of the causes of the community's ignorance and unpreparedness for marriage regulations.<sup>36</sup> On the other hand, this shows that existing regulations should have very well considered the principles of customary law that the community has believed to be true.

Theoretically, regulation as a legal norm must be responsive to social interests and the government has to understand the social context very well.<sup>37</sup> This is mainly because humans are deemed to be principally kind so that they are able to determine how to treat the law (how to obey the law) themselves.<sup>38</sup> Therefore, the law must be able to integrate cultural sub-systems into the legal system and its

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<sup>34</sup> Budiyono, the parent who apply for marriage dispensation, on January 20, 2022

<sup>35</sup> Dewi Wulansari, "Hukum Adat Indonesia" (Bandung: Reflika Aditama, 2009), 48.

<sup>36</sup> Siti Hapsah Isfardiyana, "Hukum Adat" (Yogyakarta: UII Press, 2018), 80.

<sup>37</sup> Teguh Prasetyo dan Abdul Halim Barkatullah, "Ilmu Hukum Dan Filsafat Hukum: Studi Pemikiran Ahli Hukum Sepanjang Zaman" (Yogyakarta: Pustaka Pelajar, 2009), 52-46.

<sup>38</sup> Satjipto Rahardjo, "Membedah Hukum Progresif" (Jakarta: Buku Kompas, 2008), 151.

outputs should provide justice.<sup>39</sup> Relating to this, Eugen Ehrlich said that a good and effective law must be in accordance with the living law which is a reflection of the living values in the society.<sup>40</sup> Basically, the application of customary law into positive law is divided into two concepts. The first puts the positive law that contradicts the customary law and the second believes that the law will develop following public awareness<sup>41</sup>

In this study, there found different perceptions in responding to current marriage regulations between the policymaker and the local community who are subject to regulation. In Kudus, local communities put tradition as a means of regulating people, which is a progressive legal perspective. At the same time, the government should anticipate future developments in order to overcome the change in cultural groups and public awareness that tends to be traditional and conservative.<sup>42</sup> The government tends to apply legal politics that have been determined by the state to be implemented in regulating policies. On the contrary, the government has consistently recognized and protected customary law and traditional rights.<sup>43</sup>

#### **Judges' Legal Considerations in Deciding Application for Marriage Dispensation in the Covid-19 Pandemic**

Judges have the freedom to decide any cases of marriage dispensation on the basis of obvious legal considerations (*ratio decidendi*). The obviousness of the judge's legal considerations in deciding cases has been regulated in Article 50 of Law Number 48 the

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<sup>39</sup> Harry C. Bredemeier, "Law As Integrative Mechanism, Dalam Vilhelm Aubert, (Ed) Sociology Of Law" (New York: The Free Press of Glenco, 1962), 68.

<sup>40</sup> Erwan Baharudin and Universitas Esa Unggul, "Dalam Sistem Ketatanegaraan Di Indonesia Ernawati , Erwan Baharudin Masyarakat Hukum Adat Merupakan Subyek Hukum Khusus Yang Keberadaannya Diakui Oleh Peraturan Perundang-Undangan Baik Oleh Undang- Undang Dasar Negara Republik Indonesia Tahun 1945 ( Selan" 6, no. September (2019): 53-67.

<sup>41</sup> Moh. Mahfud MD, "Membangun Politik Hukum, Menegakkan Konstitusi" (Jakarta: Pustaka LP3ES Indonesia, 2006), 76.

<sup>42</sup> Maria Rita Ruwastuti, "Sesat Pikir Politik Hukum Agraria Membongkar Alas Penguasaan Negara Atas Tanah-Tanah Adat" (Yogyakarta: Insist Press, KPA Dan Pustaka Pelajar, 2000), 110.

<sup>43</sup> Made Oka Cahyadi Wiguna, "Pemikiran Hukum Progresif Untuk Perlindungan Hukum Dan Kesejahteraan Masyarakat Hukum Adat," *Jurnal Konstitusi* Vol. 18, no. 1 (2021): 114.

year 2009 concerning judicial power.<sup>44</sup> In deciding the cases, judges are practically influenced by at least two aspects, namely constitutional regulation or the law and the judge's belief. It is mainly because the judge's freedom in interpreting the law is an individual matter.<sup>45</sup>

The granting of a marriage dispensation aims to validate the marriage of prospective bride and groom according to the Law. The technical implementation of granting marriage dispensation applications is regulated in the Supreme Court Regulation (*Perma*) Number 5 the year 2019 on guidelines for adjudicating marriage dispensation applications. According to this regulation, the judge must consider the readiness of the bride and groom based on their age. In addition to it, the judge is also required to consider the impact and risks due to marriage in term of education, reproductive health, psychology, physical, sociology, culture, potential economic disputes, domestic squabbles, and violence that might occur in the household.

This guideline is used as the basis to give marriage dispensation to the early-age people under the minimum legal age of marriage by the court.<sup>46</sup> It aims to manage judges so that they can be more careful in examining and deciding marriage dispensations for each applicant based on the law.<sup>47</sup> This circumspection is coming from the fact that child marriage has more disadvantages than benefits. Therefore, it is considered better to prevent child marriage than burden its possible impact namely divorce. Legal strengthening of child marriage prevention must therefore be increased to improve the quality of human resources, prevent pregnancy out of wedlock, and save

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<sup>44</sup> Puji Lestari, "Ratio Decidendi Putusan Hakim Pengadilan Negeri Blitar Mengenai Perjanjian Jual Beli Tanah Yang Berkeadilan" 3, no. 2 (2020): 1-10.

<sup>45</sup> Luhut M. P. Pandsgaribuan, *Lay Judges Dan Hakim Ad Hoc Suatu Studi Teoritis Mengenai Sistem Peradilan Pidana Indonesia* (Universitas Indonesia, Fakultas Hukum, Pascasarjana, 2009).

<sup>46</sup> Titing Sugiarti, Putri Ayu Maharani, Chika Agishintya, "Penelitian Internal, Analisis Perkawinan Di Bawah Umur Tanpa Dispensasi (Studi Kasus Kawin Bawah Umur Yang Terjadi Di Desa Cipenjo, Kecamatan Cileungsi, Kabupaten Bogor)" (Jakarta: Fakultas Hukum Universitas Pancasila, n.d.), 24.

<sup>47</sup> Mughniatul Ilma, "Regulasi Dispensasi Dalam Penguatan Aturan Batas Usia Kawin Bagi Anak Pasca Lahirnya UU No. 16 Tahun 2019," *AL-MANHAJ: Jurnal Hukum Dan Pranata Sosial Islam*, 2020, <https://doi.org/10.37680/almanhaj.v2i2.478>.

children who have dropped out of school.<sup>48</sup> Actually, the mechanism for granting marriage dispensation to young people is a reasonable action, but the fact that application requests for marriage dispensation significantly continue to increase during the Covid-19 pandemic era sets a <sup>1</sup> different situation.

The high number of applications for <sup>1</sup> marriage dispensation in the last five years (before and after the Covid-19 pandemic at the Kudus Religious Court) can be seen in table 1 below:

**Table 1:**  
**Kudus Religious Court Application of Marriage Dispensation**

No	Year	Number of Dispensation
1	2017	73 Applications
2	2018	66 Applications
3	2019	90 Applications
4	2020	270 Applications
5	2021	270 Applications

*Source: Interview with Secretary of the Kudus Religious Court*

It can be seen from table 1 above that, practically, the court does not invariably grant the whole applications of marriage dispensation in the last five years. Based on data at the Kudus Religious Courts, during 2020, 262 out of 270 or 97% applications were granted and 8 or 3% of applications were rejected or revoked. In 2021, 265 out of 270 or 98% of applications were granted, and 5 or 2% of applications were rejected. This data indicates that the judges' legal practice in adjudicating marriage dispensation applications is about 97.5% granted while 2.5% of it is declared rejected or revoked.

Theoretically, judges should be able to reconstruct the fundamental values of law from the aspect of legal certainty, benefit, or justice for the community. When there found any conflict among

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<sup>48</sup> Titing Sugiarti and Kunthi Tridewiyanti, "Implikasi Dan Implementasi Pencegahan Perkawinan Anak [Implication and Implementation Against of Child Marriage]," *Jurnal LLegal Reasoning Fakultas Hukum Universitas Pancasila* 4, no. 1 (2021): 81-95, <https://doi.org/https://doi.org/10.35814/jlr.v4i1.2968>.

these three values, the justice of society will determine the results.<sup>49</sup> Justice here means fairness for the marriage dispensation applicant according to their best interests in order to provide benefits and prevent harm. This is what the judges of the Kudus Religious Courts take in examining and deciding applications for marriage dispensation.

One of Kudus Religious Court judges, for instance, mentioned as follows: "Deciding on the application for a marriage dispensation does not only consider the legal aspect or the aspect of mere proof but also consider whether the decision brings benefits or otherwise." This shows how the tradition of Kudus religious court judges is different from those of other courts who tend to decide cases only based on facts revealed in court.<sup>50</sup>

In other words, judges are required to uphold the "out of box" law which is not merely based on textual or words from the law (according to the letter) but also an effort to understand the spirit of the deeper meaning (to very meaning) of it. Law enforcement does not only come from the judges' intellectual intelligence but also spiritual intelligence, empathy, dedication, and commitment along with the courage to find other ways.<sup>51</sup>

Therefore, in several cases of marriage dispensation, the judge emphasized the psychological, sociological, and cultural aspects in his/her consideration. This can be seen in cases No. 116/Pdt. P/2021/PA.Kds, No. 130/ Rev. P/2021/PA.Kds, No. 182/ Rev. P/2021/PA.Kds, No. 288/ Rev. P/2021/PA.Kds, No. 308/ Rev. P/2021/PA.Kds. In these cases, the marriage dispensation applications were granted because it was revealed through the evidence that the future brides were pregnant (pregnancy out of wedlock). The above cases typically occurred as a result of promiscuity and lack of parents' supervision of their children. Parents admitted that their children have "close friends" but are powerless to

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<sup>49</sup> Esmi Warasih, *Pranata Hukum Sebuah Telaah Sosiologis* (Malang: PT. Suryandaru Utama, 2005). 67.

<sup>50</sup> Marihot Hutajulu, "Filsafat Hukum Dalam Putusan Pengadilan/Hakim," *Refleksi Hukum: Jurnal Ilmu Hukum* 9, no. 1 SE-Articles (April 2015): 91, <https://doi.org/https://doi.org/10.24246/jrh.2015.v9.i1.p91-100>.

<sup>51</sup> Satjipto Rahardjo, "Penegakan Hutajulun Hukum Suatu Tinjauan Sosiologis" (Yogyakarta: Genta Publishing, 2009), xiii.



prevent promiscuity that led to pregnancy out of wedlock. After pregnancy was identified, the parents applied for a marriage dispensation and the court granted it. One of the applicants' parent confessed as follow:<sup>52</sup> "I am very grateful to find the judge grant my child's marriage dispensation application because she is in three months pregnant."

Other same cases show various ages of pregnancy ranging from two, three, four, to six months. There was once a dialogue between the judge and the applicant who showed her sadness at the trial. The judge seemed to really consider possible consequences if the dispensation request was not granted. Therefore, the judge finally granted the couple's marriage dispensation application for avoiding any losses to the pregnant woman as well as the reveal of disgrace to both families of the prospective couple. Even further, rejection of the application will give no protection over the legal status of the fetus in the womb.

Understanding the values of truth and justice will quite much determine whether a judge's decision can be accepted by the community or not. These values are very decisive for judges in making quality decisions that are considered valid, fair, and beneficial. Therefore, the judge does not only rely on the law or jurisprudence but also explores living values to be able to formulate a fair decision in deciding a case.<sup>53</sup>

Careful examination of the document of marriage dispensation stipulation finds that the judges like to mention the common consideration as follows: "it is urgent to marry them off immediately to avoid any more harm ". This sort of emergency condition seems to 'force' the judge to grant the application even though the decision is still supposed to be guided by evidence according to the procedural law applicable in the religious court. The word "urgent" certainly requires judges to reconstruct the law by exploring the living values in society.

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<sup>52</sup> Interview with the applicant (P) of marriage dispensation at the Kudus Religious Court on January 18, 2022

<sup>53</sup> Edi Riadi, "Dinamika Putusan Mahkamah Agung Dalam Bidang Perdata Islam [Dynamics of Supreme Court Decisions in the Islamic Civil Sector]" (Jakarta: Gramata Publishing, 2017), 1.

On the one hand, the judge must consider the aspect of readiness or maturity of the children who will marry because he/she is under the minimum legal age of marriage. On the other hand, the condition of the applicant's pregnancy becomes an urgent factor to get her marriage immediately. For urgent conditions, it is not regulated by the Supreme Court Regulation (*Perma*) Number 5 the year 2019. However, Article 17 of the *Perma* stipulates that judges must consider the best interests of children and unwritten laws extracted from legal values, local wisdom, and a sense of justice for the community. The judges' legal culture in exploring the values of truth to realize justice is, therefore, a necessity.

Basically, whether the application for a marriage dispensation is granted is way casuistic in nature. An application might be rejected for less than one month in which the applicant is advised to withdraw the application. However, other applications are perhaps granted even though the wedding date is still long ahead depending on the examination results in the court.<sup>54</sup> It shows how the judges do scrutinize the legal aspect of relevant proof and local belief in community values in deciding the case.

Judges have their own reasons for rejecting the applications as explained by one of the judges<sup>55</sup> as follow:

"The common reason for rejection was usually because the applicant is still too young and under the minimum legal age for marriage, such as 14 years. In such a case, the judge was worried that the grant would easily lead to the family's breakdown. "

Interestingly, some cases of rejection come from application revocation based on the judge's advice. In fact, normatively, based on the principles in civil procedural law, judges must be passive towards the lawsuit or application. Judges are not allowed to intervene against the lawsuit because all they have to do is decide any cases, including

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<sup>54</sup> Interview with Azizah Dwi H, Judge of the Kudus Religious Court, on January 18, 2022

<sup>55</sup> Interview with Ah. Sholeh, a judge of the Kudus Religious Court on January 25, 2022

the application of marriage dispensation, as fair and wise as possible. Another reason for rejection of the application is insufficient witnesses and doubtful evidence to reveal the legal facts at the trial. With insufficient evidence, the judges typically suggest that the marriage dispensation application be revoked.

The judge's legal considerations either for granting or rejecting the applications are not only based on the facts at trial but also on the living values in society. In most cases, judges' will tend to reject the marriage dispensation applications by giving advice to the applicants first. Then, the applications will remain rejected if it is still demanded to be proceeded at the trial. This refusal will result in the permanent rejection of the applicant's subsequent application in the future unless there is a new legal case as the basis for applying for marriage dispensation again. In contrast, the result will be probably different if the applicants directly re-apply the marriage dispensation application without having a new legal case if the applicant withdraws the previous application after getting advice from the judges.

Other than that, judges have always considered the reasons of the bride or groom's parents for initiating the early marriage. This consideration can be seen in one of the judge's decisions which were based on parents' concerns that their children would possibly violate religious norms and morality due to their close relationship with their intimate friends. As a consequence, the family burden is deemed to be reduced with the application grants because the children will merely belong to the partner's responsibility.<sup>56</sup> This obviously shows how in deciding a marriage dispensation application, judges do not only consider the facts revealed in the court, but also the living values of the community.

This is in line with the statement of a judge, one of the respondents of this research, as follows: "the consideration in deciding marriage dispensation is not only based on the facts brought up in the court but also a belief that decision is supposed to be in accordance

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<sup>56</sup> Rani Dewi Kurniawati, "Efektifitas Perubahan UU No 16 Tahun 2019 Tentang Perubahan Atas UU No 1 Tahun 1974 Tentang Perkawinan Terhadap Penetapan Dispensasi Kawin (Studi Kasus Di Pengadilan Agama Majalengka Kelas IA)," *Journal Presumption of Law*, 2021, <https://doi.org/10.31949/jpl.v3i2.1505>.

with the community's sense of justice.<sup>57</sup> The community's sense of justice is known as juridical justice values of customary law. This is a legal breakthrough by judges through their belief in giving a sense of justice-to-justice seekers, especially the applicants for marriage dispensation at the Kudus Religious Court.

### **The Legal Culture of Judges in Deciding the Marriage Dispensation Application**

Legal cultures of judges are the values that surround the judge's belief as a guide for examining and deciding any legal cases submitted to the court. These values are the truth that is believed to be true so that they affect the attitude or behavior of judges in deciding a case, including for a marriage dispensation application. Gustav Radbruch explained that culture is the embodiment of values to enforce in reality and is reflected in human behavior and law. Law, meanwhile, is a cultural reflection that becomes a bridge so that values can be enforced in guiding human desires for avoiding any conflict with the law. The law value itself aims to realize justice through formulated regulations.<sup>58</sup> This is what Lawrence M. Friedman called the legal culture which is included in one of the values of the legal system.<sup>59</sup>

This legal system contributes to law enforcement and legal substance as well as structure. Law enforcement, meanwhile, is influenced by both legal factors and examination of the facts revealed in court. The assessment of each judge is certainly different from the other because the judges' legal culture shapes this difference in examining and deciding any case. This indicates that factors outside the law also influence the judge in deciding cases.<sup>60</sup>

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<sup>57</sup> Interview with Ah. Sholeh, a judge of the Kudus Religious Court on January 25, 2022

<sup>58</sup> FX. Adji Samekto, "Hukum Dalam Lintasan Sejarah" (Bandar Lampung: Indepth Publishing, 2013), 48-49.

<sup>59</sup> Achmad Ali, "Menguak Teori Hukum (Legal Theory) Dan Teori Peradilan (Judicial Prudence) Termasuk Interpretasi Undang-Undang (Legis Prudence)" (Jakarta: Kencana Prenada Media Group, 2009), 225.

<sup>60</sup> M. Syamsudin, "Konstruksi Baru Budaya Hukum Hakim Berbasis Hukum Progresif" (Jakarta: Kencana, 2012), 289-292.

Judges basically have juridical freedom that comes from human rights and is guaranteed by law.<sup>61</sup> Freedom, meanwhile, is a basic value of human dignity which leads to any responsible actions.<sup>62</sup> This is the basis for the judge to play the role so that every decision he/she hands down should provide justice. However, the judge's freedom does not mean that she/he can immediately decide on the application for a marriage dispensation without referring to the law and complying with applicable legal norms.

Before deciding on a marriage dispensation application, judges at the Kudus Religious Court usually offer a rejection so that the applicants will postpone the marriage. Technically, they suggest applicants withdraw the request at the time of the application examination. The same suggestion, particularly to revoke the application, is delivered when the judge is not sure whether he/she will grant the application. Normatively, revoking an application is a part of the applicant's right, but the judge's advice in the examination process does affect the revocation.

The principle of civil procedural law puts the judge in the passive position toward the material of the lawsuit or requests. It means that he/she can only wait for the submitted application. They should not interfere with the application. However, this passive principle seems to have shifted based on Article Paragraph (1) of Law Number 48 the Year 2009 concerning judicial power which states as follows: "Judges and constitutional judges are obliged to explore, follow, and understand legal values and a sense of justice that lives in society." These values are thus used as the basis for the judge to provide advice or suggestions to the applicant to withdraw the application.

Additionally, in Kudus Religious Court, although the judges hold the authority to decide a legal case, they likely make a dialogue with fellow judges in examining the case to ensure their decision is in

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<sup>61</sup> K. Bertens, "Etika" (Jakarta: Gramedia Pustaka Utama, 2000), 102-104. Sedangkan Frans Magnis - Suseno Menggunakan Istilah Kebebasan Normatif, Yaitu Keadaan Yang Dialami Manusia Tidak Berada Dalam Paksaan. Lihat Frans Magnis dan Suseno, "Etika Dasar, Masalah-Masalah Pokok Dalam Filsafat Moral" (Yogyakarta: Penerbit Kanisius, 1985), 30.

<sup>62</sup> Andre Atta Ujan, "Filsafat Hukum, Membangun Hukum, Membela Keadilan" (Yogyakarta: Pustaka Filsafat. Kanisius, 2009), 126.

line with the government regulations and living values of the local community. This dialogue is needed to prevent any injustice decisions on the requested applications for marriage age dispensation. Therefore, when a judge deviates from how they have to, he/she will encounter guilt and social punishment. However, this will only matter for those with conscience, social, and moral sensitivity. In contrast, judges who do not have such senses will do otherwise.<sup>63</sup>

### Conclusion

The findings of this study are significantly different from previous research studies. Previous studies discussed the high number of applications for marriage dispensation due to the Covid-19 pandemic. Meanwhile, this study found that the high number was due to the pandemic situation and triggered by the Marriage Law (UUP) regulation regarding the minimum legal age for marriage. It also found that Kudus people's perception of maturity really matters in triggering the high number of marriage dispensation applications. Additionally, the Kudus judges are also known to consider many things in deciding the case ranging from legal facts at the trial court, values of justice living in the society, to Supreme Court rules. Meanwhile, in making a decision on the case, the judges consult with fellow judges, and then they mostly advise applicants to revoke the application first. This research finally uncovers the urgent need to integrate any decision of the court and any rule or law of the government with living values in the society.

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<sup>63</sup> M. Syamsudin, "Konstruksi Baru Budaya Hukum Hakim Berbasis Hukum Progresif [New Construction of Judge Legal Culture Based on Progressive Law]." 47.

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# Judges' Legal Culture in Dealing with High Number of Applications for Child Marriage Dispensation during Covid-19 Pandemic at the Kudus Religious Court

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